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LESLIE KLEIN

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LESLIE KLEIN,
Appellant Defendant,

vs.

ROBERT & ESTHER
MERMELSTEIN,
Appellee, Plaintiff
Judgment Creditor.

Case No.: 2:24-cv-04607-JGB
Appeal from:
Case No.: 2:23-bk-10990-SK
Adv. No.: 2:23-ap-01153-SK

Before the Hon. Jesus G. Bernal

**APPELLANT'S OPPOSITION TO
MOTION TO DISMISS APPEAL
FOR FAILURE TO PROSECUTE;
REQUEST FOR JUDICIAL
NOTICE; DECLARATION OF ERIC
J. OLSON IN RESPONSE TO
MOTION TO DISMISS**

Hearing: September 23, 2024
Time: 9:00 AM
Place: 3470 Twelfth Street
Riverside, California
92501

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**APPELLANT'S OPPOSITION TO MOTION TO DISMISS APPEAL FOR FAILURE TO PROSECUTE;
REQUEST FOR JUDICIAL NOTICE; DECLARATION OF ERIC J. OLSON IN RESPONSE TO MOTION
TO DISMISS**

1 **OPPOSITION TO MOTION TO DISMISS APPEAL FOR FAILURE TO**
2
3 **PROSECUTE**

4 Appellant opposes the Motion to Dismiss Appeal for Failure to
5 Prosecute.

6
7 Dated: August 29, 2024



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9 Eric J. Olson
10 Attorney for Appellant Defendant
11 Judgment Debtor Leslie Klein

12 **POINTS AND AUTHORITIES**

13 **BACKGROUND FACTS**

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15 a) This case ("the Mermelstein case") is related to the case of Berger v.
16 Klein (2:24-cv-03344-JGB) ("the Berger case") (See Notice of Related
17 Cases Doc 12, a copy of which is attached as Exhibit I)¹. The two
18 cases are virtually identical in all material respects except that there
19 is no motion to dismiss appeal in the Berger case.
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¹ The other two cases, 2:23-cv-09541-JGB and 2:24-cv-03543-JGB have been dismissed on bases that as more fully set forth herein, are not probative on this motion.

1 b) The Mermelstein case was filed in this Court on April 23, 2024 (Doc
2 1). A copy of the docket is attached hereto as Exhibit II. A copy of the
3 docket in the Berger case is attached hereto as Exhibit III.
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5 c) On June 10, 2024, a notice was filed from the Bankruptcy Court that
6 the record was deficient in not including the Statement of Issues and
7 Designation of Record. (See Appellees' Exhibit 1), and the Honorable
8 Fred W. Slaughter issued an Order to Show Cause reciting that those
9 documents and a third (notice regarding the ordering of transcripts)
10 had not been filed and requiring a response by June 20, 2024 "why
11 this appeal should not be dismissed for lack of prosecution. Failure of
12 Appellant to make adequate and/or timely response tot his Order will
13 result in the dismissal of the appeal". (See Appellees' Exhibit 2).
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16 d) On June 12, 2024, Appellant filed a Response to the Order to Show
17 Cause showing that on June 10, 2024 he had filed the Designation of
18 Record and Statement of Issues and that the Notice Regarding
19 Ordering of Transcripts had actually been filed on April 24, 2024.
20 (See Appellees' Exhibit 3).
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23 e) Notwithstanding such Response Appellees threatened to move to
24 dismiss the appeal (See Appellees' Exhibit 5), such threatened
25 appeal to be based on the decision of this case in the case of Menlo
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1 v. Klein 2:23-cv-9541-JGB (See Appellees' Exhibit 4), plus that (they
2 claimed) the OSC contemplated a response that not only showed that
3 the identified documents had been filed as contemplated but also an
4 additional recitation. This motion was filed July 10, 2024.
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7 f) There was no response by Judge Slaughter indicating that the
8 Response was unsatisfactory². On August 12, 2024, the Court, in
9 both this case and the Berger case designated that a brief was to be
10 served and filed by September 11, 2024 (Exhibit II No. 18) and
11 (Exhibit III No. 16). Appellant anticipates filing his brief by September
12 11, 2024.
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15 g) The underlying questions addressed at C infra and occupying most of
16 the supporting material in Appellees' motion is the failure of counsel
17 of Appellee to comply with his obligation to give notice of the
18 contemplated default and offer Appellant a reasonable opportunity to
19 Answer despite two written requests on behalf of Appellant and his
20 attempted justification therefor.
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² Compare the situation in 2:24-cv-03543-JGB wherein Chief Judge Gee dismissed indicating that she deemed the response was not what she contemplated.

ARGUMENT

**A. APPELLEES' MOTION IS SERIOUSLY DEFICIENT AS A
MATTER OF FORM IN FAILING TO INCLUDE DOCUMENTS**

1. Appellees' motion purports to be based on a Request for Judicial Notice, Appellees "*request the Court to take judicial notice of the following documents, which are attached hereto, in ruling on the concurrently filed Motion to Dismiss the Appeal...*" listing 30 documents. See Document 13, Page 14 Lines 3-5. However, the listed documents are not attached.

**B. APPELLEES' MOTION TO DISMISS FOR FAILURE TO
PROSECUTE IS WHOLLY UNSUPPORTED BY THE FACTS OR
THE OPINION IN THE CASE OF MENLO**

2. Appellees' Motion to Dismiss Appeal For Failure to Prosecute is totally unsupported by the facts. A copy of the docket is attached hereto as Exhibit II. The first matter where Appellant was called on to do anything was June 10, 2024 and Appellant filed a Response on June 12, 2024 showing that it had been accomplished.
3. Appellees complain that the Response should have contained more descriptive/argumentative material but there was no complaint by the Court whose OSC it was and the Court proceeded in the ordinary

1 course of business and on August 12, 2024, the Court set the case
2 for briefing (on the same date the Court also set the Berger case for
3 briefing). (See Exhibits II, III)
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5 4. In the Case of Menlo (Exhibit 4) relied on by Appellees, the Court
6 noted at page 1-2 that the Bankruptcy Court had filed a deficiency
7 notice on November 28, 2023 (docketed by this Court December 4,
8 2023) and responsive documents were filed January 4, 2024 and that
9 on January 31, 2024 the Court ordered that the brief be filed March 1,
10 2024. The motion to dismiss therein was filed May 13, 2024. The
11 Court therein states at pp 2-3 "*A litigant must prosecute an action*
12 *with 'reasonable diligence' to avoid dismissal pursuant to Rule 41(b).*
13 *Anderson v. Air W, Inc 542 F 2d 522, 524 (9th Cir. 1976). Dismissal*
14 *pursuant to Rule 41(b) requires a showing of unreasonable delay.*
15 *Omstead v. Dell, Inc 594 F 3d 1081, 1084 (9th Cir 2010).*
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20 5. By contrast, in this case, the deficiency notice was cured within 2
21 days (8 days before the deadline set by the Court) and the order
22 setting a briefing would not occur for over a month setting the briefing
23 for September 11, 2024. Since the same briefing schedule was set
24 for the same day in the Burger case neither the Court nor Appellees
25 were inconvenienced or prejudiced.
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1 **C. THE UNDERLYING ISSUE IS THAT APPELLEES SEEK TO**
2 **EXCUSE THE FAILURE OF THEIR COUNSEL TO HONOR HIS**
3 **PROFESSIONAL AND LEGAL OBLIGATION TO WARN THE**
4 **OPPOSING COUNSEL OF INTENT TO FILE A DEFAULT AND**
5 **AFFORD A REASONABLE TIME TO FILE AN ANSWER.**
6 **DESPITE A WRITTEN REQUEST ON BEHALF OF DEFENDANT**
7 **APPELLANT TO GIVE OPPORTUNITY TO FILE THE ANSWER,**
8 **APPELEES' COUNSEL IGNORED THE REQUEST ON THE**
9 **LEGALLY UNSUPPORTABLE EXCUSE THAT THE WRITER OF**
10 **THE LETTER, ATTORNEY OLSON, WAS NOT THE ATTORNEY**
11 **OF RECORD FOR DEFENDANT APPELLANT. THE DEFAULT**
12 **SHOULD, UNDER THE CIRCUMSTANCES, BE TREATED AS A**
13 **NULLITY.**

14 6. Appellees refer in the declaration of their counsel Paragraph 15 at
15 Page 19 to: "Cohen gave Olson a professional courtesy notice of
16 Plaintiffs' intentions to pursue a default against the Debtor/Defendant,
17 pursuant to Section 15 of the State Bar's enacted California Attorney
18 Guidelines of Civility and Professionalism; *Shapell Socal Rental*
19 *Properties, LLC v. Chico's FAS, Inc., (2019) 36 Cal.App.5th at 134,*
20 *137, No. G060411, 2022 Cal. App. LEXIS 854 (Ct. App. Oct. 17,*

21 APPELLANT'S OPPOSITION TO MOTION TO DISMISS APPEAL FOR FAILURE TO PROSECUTE;
22 REQUEST FOR JUDICIAL NOTICE; DECLARATION OF ERIC J. OLSON IN RESPONSE TO MOTION
23 TO DISMISS

2022); *Fasuyi v. Permatex, Inc.*, 84 Cal. Rptr. 3d 351
 (Cal.Ct.App.2008), quoting *Au-Yang v. Barton*, 90 Cal. Rptr. 2d 227
 (1999)); *Lasalle v. Vogel*, 36 Cal. App. 5th 127, 248 Cal. Rptr. 3d 263
 (2019); *Pearson v. Continental Airlines*, (1970) 11 Cal.3d 613, 619);
Weil & Brown, Civil Procedure Before Trial (Rutter 2007) 5:68-5:70.”

7. The same language and citations appear in Cohen’s letter of
 November 27, 2023 (See Cohen Declaration Paragraph 23, Exhibit IV
 Exhibit I attached hereto).

8. Mr. Cohen’s Declaration at Paragraph 25, 28 and 29 as follows:

“25. On 11-29-2023, after the default was entered, Olson resurfaced
 – without a filed substitution of attorney – requested yet another
 stipulation setting aside the default, and a continued response date.

See, Olson Declaration, Exhibit “B” [Doc-49] (“3rd Extension
 Request).”

“28. On 12-8-2023, Olson followed up with Cohen requesting the
 same. See, See, Olson Declaration, Exhibit “C” [Doc-49]”

“29. Olson’s 11-29-2023 and 12-8-2023 letters (“2nd Extension
 Request”) were irrelevant and nullities since Olson was not counsel of
 record for Defendant. Olson never substituted into this adversary as
 counsel for Defendant, admitting that he’s not even a “real bankruptcy

1 attorney". Accordingly, his letters to Plaintiffs' counsel are of no
2 consequence, as Plaintiffs' counsel had no obligation to respond to
3 Defendant's non-lawyer. Plaintiffs, after being victimized by
4 Defendant for so long, and out of so much money, could not in good
5 faith agree to Defendant's further requests for extensions."
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8 9. Appellees offer no support for the idea that their obligation to inform
9 counsel of a default only applies to an attorney of record. To the
10 contrary, for instance, in one of their cases cited by Appellees,
11 Shappell SoCal Rental Properties, LLC v. Chico's FAS, Inc. 85 Cal.
12 App. 5th 198 at 205 and 214 (2022), a landlord tenant case, landlord
13 has served tenant with a notice to pay rent or quit. Attorneys on
14 behalf of tenant wrote to landlord identifying themselves as attorneys
15 for tenant to receive communications in any matter pertaining to the
16 lease. Landlord, without notifying counsel filed an unlawful detainer
17 then entered a default judgment. Although landlord plainly knew of
18 the attorneys they were by definition not attorneys of record in the
19 unlawful detainer and yet the Court held that landlord owed the
20 obligation to give notice to the attorneys for tenant.
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26 10. The obligation is not a mere "professional courtesy" as counsel
27 characterizes it. The Shapell case, supra cited by Appellees, opens
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1 with the words “An attorney has both an ethical and a statutory
2 obligation to warn opposing counsel, if counsel’s identity is known, of
3 an intent to seek a default and to give counsel a reasonable
4 opportunity to file a responsive pleading. In *Lasalle v. Vogel* (2019)
5 36 Cal. App. 5th 127, 137 [248 Cal. Rptr. 3d 263] (*Lasalle*), a panel of
6 this Court confirmed that obligation directly, unequivocally, and
7 without qualification.”
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11 11. The Ninth Circuit has confirmed counsel’s obligations under the
12 California author *Ahanchian v. Xenon Pictures, Inc.* 624 F.3d 1253
13 (9th Cir. 2010).
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15 12. Counsel for Appellees has characterized the requests on half of
16 Appellant for an opportunity to file an Answer as “nullities”. Instead
17 the default taken in violation of those obligations and the judgment
18 taken based thereon should be treated as nullities.
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CONCLUSION

For the reasons set forth, the Court should deny the Motion to
Dismiss Appeal for Failure to Prosecute.

Dated: August 29, 2024



Eric J. Olson
Attorney for Appellant Defendant
Judgment Debtor Leslie Klein

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18, and not a party to the within entitled action; my business address is 301 East Colorado Boulevard Suite 520, Pasadena, California 91101.

On August 29, 2024, I served the foregoing **"Response to Appellee's Motion to Dismiss Appeal for Failure to Prosecute; Request for Judicial Notice; Declaration of Eric J. Olson"** on the interested parties in this action by:

I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") AND/OR BY EMAIL:

• Paul P. Young	-	<u>paul@cym.law</u>
• Nikko Salvatore Stevens	-	<u>nikko@cym.law</u>
• Armen Minassarian	-	<u>armen@cym.law</u>
• Clarisse Young Shumaker	-	<u>youngshumaker@smcounsel.com</u>
• Brett J. Wasserman	-	<u>wasserman@smcounsel.com</u>
• Robert P. Goe	-	<u>kmurphy@goeforlaw.com</u>
• John W. Lucas	-	<u>jlucas@pszilaw.com</u>
• Ron Maroko	-	<u>ron.maroko@usdoj.gov</u>
• Baruch C. Cohen	-	<u>bcc@baruchcohenesq.com</u>
• Jeff Nolan	-	<u>jnolan@pszilaw.com</u>

II. SERVED BY U.S. MAIL:

**U.S. District Court
Attention: Judge Slaughter – Chambers Copy
3470 Twelfth Street
Riverside, California 92501**

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Pasadena, California.

**APPELLANT'S OPPOSITION TO MOTION TO DISMISS APPEAL FOR FAILURE TO PROSECUTE;
REQUEST FOR JUDICIAL NOTICE; DECLARATION OF ERIC J. OLSON IN RESPONSE TO MOTION
TO DISMISS**

1 I am employed in the office of a member of the bar of this Court at
2 whose direction the service was made. I declare under the penalty of
3 perjury under the laws of the State of California and the United States that
4 the foregoing is true and correct and that this is executed on August 29,
5 2024, at Pasadena, California.

6
7 
8 Jasper Pantaleon